Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of		
High-Cost Universal Service Support	)	WC Docket No. 05-337
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
Lifeline and Link Up	)	WC Docket No. 03-109
Universal Service Contribution Methodology	)	WC Docket No. 06-122
Numbering Resource Optimization	)	CC Docket No. 99-200
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
IP-Enabled Services	)	WC Docket No. 04-36

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INTRODUCTION AND SUMMARY

The Commission began its intercarrier compensation reform proceeding in 2001. Since then, AT&T has worked tirelessly with regulators and other industry members to identify issues and find agreement on how to address them. The Commission is now very close to adopting an order that takes definitive steps toward comprehensive reform of both intercarrier compensation and universal service.[1] The steps the Commission proposes will not fully resolve every issue that must eventually be addressed, nor will they completely satisfy every industry segment or interest group. But they are essential to fixing a regulatory status quo that almost everyone concedes is irrational and unsustainable. And they will provide a reasonable and balanced basis upon which the Commission, the industry, and state regulators can build.

In the seven years since the intercarrier compensation reform proceeding was launched, the telecommunications marketplace has changed almost beyond recognition, even as the archaic intercarrier compensation regime has remained essentially unchanged. Circuit-switched networks deployed primarily for voice service are rapidly yielding to optical IP packet-switched networks over which voice is just one of many applications. According to the National Cable Television Association, cable operators already provide VoIP service to over 16 million subscribers, and they offer such service to more than 100 million customers. Over-the-top VoIP providers serve millions of other customers, with Vonage alone serving over 2.6 million.

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[1] As discussed below, AT&T supports the reform plan for intercarrier compensation and universal service distribution outlined in the draft order included in Appendix C to the November 5, 2008 Further Notice of Proposed Rulemaking, subject to several modifications. *See* Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *High-Cost Universal Service Support*, WC Docket No. 05-337 (and related proceedings), FCC No. 08-262 (rel. Nov. 5, 2008) ("*Further Notice*"). These comments refer to that draft order as the *Appendix C Draft Order* or simply as the *Draft Order*. For the reasons detailed in its November 21 *ex parte* letter, AT&T supports, with a few modifications, the contribution methodology provisions in the draft order set out in Appendix B to the *Further Notice* (*i.e.*, the "*Appendix B Draft Order*"). *See* Letter from Mary L. Henze, AT&T, to Marlene Dortch, FCC, WC Docket No. 06-122 and CC Docket Nos. 96-45 and 01-92 (filed Nov. 21, 2008) ("*AT&T Nov. 21 Ex Parte*").

Meanwhile, T-Mobile has deployed a service that permits its wireless subscribers to use their home Wi-Fi networks to make unlimited local and long-distance calls for $9.99 a month over broadband connections, while Sprint/Clearwire has begun to deploy a nationwide WiMax network. And both Verizon and AT&T are spending huge sums of money rolling out fiber-based broadband networks that will carry packetized voice communications, along with other services.

This technological revolution has placed the existing intercarrier compensation and universal service systems on a collision course. Access revenues are declining rapidly, as are the implicit subsidies still embedded in them. Carriers that rely on such subsidies to recover the costs of serving rural and other high-cost areas will therefore lose the support on which they and their customers depend. And the effects of this industry transformation are not limited to rural areas and the carriers that serve them. Under today's intercarrier compensation framework, designed for a pre-Internet and pre-competition era, identical functionalities are priced at dramatically different levels depending upon jurisdiction, technology, and regulatory status. Those regulatory disparities distort competition and investment while promoting arbitrage and sometimes outright fraud. These problems are well-known to the Commission, and they consume enormous resources as the Commission and the industry struggle, often unsuccessfully and always belatedly, to address them on a piecemeal basis.

The Commission must act now to overhaul its intercarrier compensation rules in order to ensure adequate funding of service in rural areas and to eliminate the arbitrage and competitive disparities that increasingly undermine the current system. With relatively minor modifications, the *Appendix C Draft Order* would take important steps toward these ends by establishing a unified terminating compensation regime, permitting increases in certain end-user charges and, in some cases, supplemental universal service support. The *Draft Order* would also begin to transform the universal service fund ("USF") into a mechanism for inducing carriers to make the network investments necessary to deploy broadband service to all Americans. This, too, will be a welcome and long-overdue change. American consumers are poorly served by today's universal service system because, among other deficiencies, it does little to support the network investment necessary to deploy broadband services in unserved areas, a key national objective codified in Section 706 of the 1996 Act. Revamping the federal USF mechanism to achieve that objective will help boost the American economy and its global competitiveness and will benefit all American consumers. Over the long term, many questions about the details of this mechanism will need to be answered, and much work will remain, but the Commission must begin taking the necessary steps to make universal broadband availability a reality.

It is no longer responsible to postpone reform in a quest for perfect consensus. No solution could make every party to this proceeding entirely happy. AT&T itself will lose very substantial support under the approach outlined in the *Appendix C Draft Order*. It will lose most of the USF support it now receives as a competitive eligible telecommunications carrier ("CETC"); and, as the largest incumbent local exchange carrier ("ILEC") in the United States, it will lose prodigious access revenues as well. While AT&T may recover some of those access revenue losses by raising its subscriber line charges ("SLCs"), competition will likely constrain AT&T's ability to recover all those losses through SLC increases, and AT&T does not expect to recover them through any additional universal service support. Moreover, although AT&T's long-distance and wireless operations will pay less to other carriers in the form of termination rates, they will not be able to retain those cost savings. Today's indisputably intense competition among providers of long-distance and wireless services will force them to pass through their access charge savings to consumers in the form of still lower retail rates and/or greater investment in service quality and innovation.

AT&T nonetheless supports the basic Appendix C framework because it will remove regulatory impediments to robust industry growth and enhanced consumer welfare and provide a more stable environment in which to achieve the Commission's universal service objectives. By reducing today's excessive termination rates, the framework will eliminate what amounts to a multi-billion-dollar tax on telecommunications usage and thereby increase consumer demand for communications services. By eliminating the many inefficient arbitrage opportunities that arise from today's grab-bag of termination rates, it will allow the market to function more efficiently. And by creating a sustainable basis for universal service support and taking the first critical steps toward promoting broadband deployment to underserved areas, it will benefit consumers in every part of the country. As discussed below, the *Appendix C Draft Order* needs to be refined in several important respects to fill gaps and avoid certain unintended regulatory consequences. But on the whole, it presents a historic opportunity to make the tough but necessary decisions required to adapt intercarrier compensation and universal service rules to today's realities. The Commission should seize that opportunity. Otherwise, this Commission's chief legacy may be inaction in the face of an impending regulatory death spiral.

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AT&T applauds the two basic changes the Commission made to its proposed order in the weeks before the release of the *Further Notice:* the inclusion, in Appendix C, of (i) measures proposed by OPATSCO and WTA to protect rural rate-of-return carriers (*see Draft Order* ¶¶ 27, 30) and (ii) the five-year phase-down for CETC funding proposed by CTIA (*see id.* ¶ 52).

AT&T also agrees with the *Draft Order*'s approach to each of the two issues on which the Commission "seek[s] particular comment" (*Further Notice* ¶ 41). First, for the reasons explained in the *Draft Order*, the Commission should adopt the proposed "incremental cost" standard rather than TELRIC for call-termination purposes. That standard will move the industry in the right direction by compelling most carriers to look primarily to their end users for recovery of their network costs, rather than other carriers and *their* end users, as TELRIC permits. This methodological shift will thus make each carrier more accountable to its subscribers for any inefficiencies in its network and will let consumers, rather than intercarrier compensation rules, pick winners and losers in the marketplace. The Commission should likewise adopt the *Draft Order*'s decision to maintain a "single, statewide rate" for termination rather than "a single rate per operating company" (*Further Notice* ¶ 41). As the European experience has shown, experimentation with rates that vary by carrier or carrier type would produce inefficient, competitively biased cross-subsidies and regulatory uncertainty.

AT&T thus encourages the Commission to adopt the *Appendix C Draft Order* with several discrete modifications, including the following four. *First*, as CTIA and others have proposed, the Commission should shorten the proposed transition period over which the revised intercarrier compensation rules will take effect. The *Draft Order* would establish a three-step transition to take place in years 2, 4, and 10. That should be shortened to a transition that takes place over the course of five years, beginning in mid-2009 in concert with annual ILEC access filings. (Individual states should also be free to streamline the transition by using the two-step approach described below.) A ten-year transition is far too long, given the accelerating erosion of the POTS business model, on which today's implicit support relies.

Second, the Commission should resolve pending disputes about the treatment of IP/PSTN traffic during the transition to a unified termination rate. The *Draft Order* is right to classify VoIP as an "information service." It also correctly observes that, at the end of the transition period, IP/PSTN traffic will be assigned the same termination rate as any other traffic, so the current disputes about compensation for that traffic will become moot. But the *Draft Order* leaves unanswered basic questions about termination rates for IP/PSTN traffic *during* the transition. As AT&T has explained, such traffic is not exempt from the access charge regime under the current compensation rules, even though the service purchased by VoIP subscribers on the non-PSTN side of the call is an information service. All "interexchange" IP/PSTN traffic (as identified by the calling party's number or applicable factors) should thus be treated as access traffic during the transition. In particular, while that transition is in progress, the Commission should treat all terminating interexchange VoIP traffic as interstate access traffic for billing purposes and should subject it to the same phase-down as other interstate access traffic—first to the interim reciprocal compensation levels contemplated in Step 2 of the proposed transition, and then down to the uniform reciprocal compensation rates under the Commission's new methodology. Similarly, "local" IP/PSTN traffic should immediately be treated the same as local PSTN traffic for billing purposes and should be subject to the same transition rules as that traffic. The Commission can and should adopt these compensation rules without affecting any other rights VoIP providers or their CLEC partners may have and without imposing any additional obligations on them.

Third, the Commission should put an immediate stop to "traffic-pumping" schemes, which, at the expense of ordinary consumers, churn out windfall profits for unscrupulous LECs with grossly inflated access charges. Specifically, the Commission should conclude that it is per se unjust and unreasonable for any LEC to assess access charges for calls to end users with whom the LEC has entered into a "revenue sharing" arrangement—*i.e.*, an arrangement that will produce net payments from the LEC to the calling provider over the life of the arrangement. Indeed, the Commission should take that step no matter what other measures it implements for broader intercarrier compensation reform.

Fourth, the Commission should adopt the universal service contribution regime proposed in Appendix B to the *Further Notice* (with the modifications detailed in the *AT&T Nov. 21 Ex*

Parte and summarized in Section III.B below) rather than the regime proposed in Appendix C. The two proposals are very similar, in that each would assess contribution obligations on the basis of North American Numbering Plan ("NANP") numbers and business-line connections. The Appendix B approach, however, would extend the numbers-based contribution obligation to all NANP numbers, whether "business" or "residential," whereas the Appendix C approach would limit that obligation to "residential" numbers. This latter approach would be problematic because there is often and increasingly no workable distinction between "residential" and "business" telephone numbers, and the proposal would thus be nearly impossible to implement. The alternative approach proposed in Appendix B would not only avoid this basic concern, but also benefit ordinary consumers by enlarging the universe of numbers subject to a contribution obligation and thereby (all else held equal) reducing the fee assessed on any given number.

Finally, the Commission should reject Free Press's proposal (attached to the *Further Notice*) to impose new limitations on an ILEC's ability to raise its SLC to compensate for a loss of access revenues if it has long-distance or wireless affiliates that will pay reduced access charges under the new regime. To begin with, this so-called "fairness" proposal is in fact unfair. Wireless and long-distance competition, which is indisputably fierce, will force wireless and long-distance carriers to pass through the lion's share of their access charge savings to consumers through rate reductions, improved service quality, and/or investment in new broadband infrastructure. Thus, far from maintaining neutrality or "fairness," the Free Press proposal would substantially harm ILECs with long-distance affiliates, wireless affiliates, or both. In any event, it would make no economic sense to impose different rules on carriers offering the same services depending on their corporate relationships with other carriers offering other services. Free Press's proposal would merely give some companies artificial regulatory advantages over others and create perverse marginal incentives for corporate fragmentation.

ARGUMENT

These comments are divided into three major sections: Section I explains why the proposed reform of intercarrier compensation rules is fundamentally sound—and why Free Press's proposal to treat incumbent LECs with long-distance or wireless affiliates differently from other LECs is fundamentally *unsound*. Section II proposes several modifications to that reform plan. Finally, Section III addresses issues relating to universal service reform. These comments are not meant to be comprehensive. The *Draft Order* set forth in Appendix C is, in most critical respects, simply a variation on industry proposals that have been before the Commission for years, and AT&T has already filed voluminous comments on them. AT&T respectfully refers the Commission to its prior submissions in this docket to the extent these comments do not revisit issues that AT&T has previously discussed.[2]

I. THE INTERCARRIER COMPENSATION REFORMS SET FORTH IN APPENDIX C ARE NECESSARY AND FUNDAMENTALLY SOUND

A. The Commission Should Require Uniform Termination Rates Within Each State Based On Its Proposed Incremental Cost Standard

The *Further Notice* "seek[s] particular comment on two questions" (¶ 42): First, should the Commission adopt an "incremental cost" approach to termination rates, as the *Appendix C*

[2] *See, e.g.*, Ex Parte Brief of the Intercarrier Compensation Forum in Support of the Intercarrier Compensation and Universal Service Reform Plan, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (filed Oct. 5, 2004) (attaching Ex. B, Summary of the ICF Plan); Reply Comments of AT&T Corp., *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (filed July 20, 2005) (supporting ICF Plan); Letter from NARUC Task Force on Intercarrier Compensation to Kevin Martin, Chairman, FCC, attaching Missoula Plan, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (filed July 24, 2006) ("*Missoula Plan*"); Comments of the Supporters of the Missoula Plan, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (filed Oct. 25. 2006); Reply Comments of AT&T Inc. on the Missoula Plan for Intercarrier Compensation Reform, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (filed Feb. 1, 2007) ("*AT&T Missoula Reply Comments*").

Draft Order proposes? Second, should each state establish a uniform terminating rate for all carriers on a statewide basis, as the *Draft Order* also proposes? In each case, the answer is yes.

1. The Commission Should Adopt The Proposed Incremental Cost Standard Rather Than TELRIC

For the reasons identified in the *Appendix C Draft Order*, the proposed "incremental cost" standard is far superior to TELRIC as a means of setting intercarrier compensation rates, both because it will dramatically reduce the competitive distortions that can arise from any regulatory rate-setting regime and because it will make each carrier more accountable to its own end users for the efficiency of its operations.

As an initial matter, this incremental cost standard is plainly lawful; indeed, it is more consistent than TELRIC with the governing statutory language. Section 252(d)(2)(A)(ii) provides that reciprocal compensation rates should reflect "a reasonable approximation of the *additional costs* of terminating" the calls at issue. (Emphasis added.) As the *Draft Order* explains (at ¶ 259), the term "additional costs" appears in only one other place in the Communications Act—in Section 224, which caps the price charged for attaching a device to a utility pole. And in that context the Commission has long construed this term to signify the same type of incremental cost methodology proposed here: "those costs which would not be incurred 'but for' the CATV pole attachment."[3] The Commission derived this standard in part from the underlying Senate Report, which states that "'additional costs' are generally equivalent to what is referred to as incremental cost[.]"[4] Because terms used in different parts of the same statute

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[3] Notice of Proposed Rulemaking, *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C. 2d 3, ¶ 23 (1978) ("*Pole Attachment NPRM*"); *see also* Memorandum Opinion and Second Report and Order, *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C. 2d 59, 72 (1979).

[4] *Pole Attachment NPRM*, 68 F.C.C. 2d at ¶ 14 n.1 (1978).

are ordinarily presumed to have the same meaning,[5] the term "additional costs" as it appears in Section 252(d)(2) should likewise be construed to mean "those costs which would not be incurred 'but for'" the termination of traffic.

As the *Draft Order* further explains, that standard and TELRIC prescribe very different approaches to cost recovery. TELRIC is a form of average-cost pricing. As applied to reciprocal compensation, it forces a sending carrier to contribute to the total costs, including joint and common costs, of shared facilities in a terminating carrier's network (tandem and end office switching and shared transport) in direct relation to the portion of shared capacity the sending carrier "uses" when it delivers calls to the terminating carrier.[6] In that respect, TELRIC does not differentiate between capacity consumed by a carrier's own customers and capacity consumed by interconnecting carriers. In contrast, the "incremental cost" standard proposed in the *Draft Order* begins by asking how much capacity a hypothetical ILEC would need to build into these shared facilities but for the need to perform the designated call-termination functions, and it makes sending carriers responsible only for the additional costs that this ILEC would incur once it takes those functions into account. That standard thus forces each terminating carrier to *look first to its own end users* for recovery of joint and common network costs.

As the Commission observes, "the incremental cost of call termination under the traditional economic definition should be significantly lower than that calculated under a

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5 The "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (quoting *Department of Revenue of Ore. v. ACF Industries, Inc.*, 510 U.S. 332, 342 (1994)).

6 *See Appendix C Draft Order* ¶ 245 (explaining that TELRIC "permit[s] average-cost pricing using a forward-looking cost methodology" in that, with some exceptions, "the Commission's TELRIC rules permitted the full forward-looking cost of the local switch, tandem switch, and shared interoffice transmission facilities, including a reasonable allocation of common costs, to be recovered through usage-based charges").

TELRIC methodology." *Appendix C Draft Order* ¶ 246. Indeed, "the incremental costs of terminating traffic, as determined using this methodology, are likely to be extremely close to zero." *Id.* ¶ 268. That is as it should be. By setting termination rates at low levels, the proposed standard will move the industry in the right direction by compelling most carriers to rely primarily on their own end users for recovery of their network costs rather than on other carriers and, ultimately, *their* end users. This methodological shift will reward efficient carriers and punish inefficient ones, forcing carriers either to reduce their costs to the prescribed compensation level or incorporate those costs in their own retail rates—which, unlike intercarrier compensation, are subject to competition. The proposed approach will thus make each carrier more accountable to consumers and will let consumers, rather than intercarrier compensation rules, pick winners and losers in the marketplace.[7]

The proposed approach also avoids the danger that termination rates set according to an average-cost methodology such as TELRIC will create perverse arbitrage opportunities, inefficient cross-subsidies, and other market distortions. Using TELRIC for reciprocal compensation purposes creates intractable problems of both rate *structure* and rate *level*. First, as to rate structure, TELRIC irrationally permits terminating carriers to recover their average network costs, many of which are non-traffic-sensitive, from other carriers through purely traffic-sensitive usage charges. The result is a mismatch between the way costs are incurred and the way they are recovered, with predictably inefficient consequences. In particular, the per-minute recovery of average costs under TELRIC gives each carrier artificial incentives to terminate as many minutes as possible, because by hypothesis the average network costs on which per-minute revenues are based always exceed the incremental costs to the carrier of using its network for each additional minute. Second, even apart from this problem of rate structure,

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7 *See AT&T Missoula Reply Comments* at 3, 8-9.

no regulator, no matter how omniscient and dedicated, can be expected to set rates at levels that, even in the aggregate, perfectly reflect the underlying costs of shared network facilities.[8]

These inevitable distortions in both rate structure and rate level create not just destabilizing regulatory uncertainty, but also a range of wasteful arbitrage schemes, as carriers hunt down and exploit the implicit subsidies included in inflated termination rates. The classic example of this problem was the ISP reciprocal compensation controversy that the Commission ultimately resolved by adopting termination rates far below the levels prescribed in TELRIC proceedings. That approach eliminated any risk of inefficient cross-subsidies for ISP-serving CLECs. But it fixed the problem of implicit cross-subsidies only with respect to this single type of traffic. And if the D.C. Circuit rejects the Commission's most recent legal justification for this fix, massive arbitrage is likely to resume unless the Commission adopts a new cost methodology for all traffic subject to Section 251(b)(5).

To be sure, determining the "incremental cost" of terminating traffic will itself be an inexact science. But an incremental cost approach will correct TELRIC's inherent rate-structure problem by confining traffic-sensitive intercarrier compensation to the recovery of truly traffic-sensitive costs—namely, the incremental costs a carrier actually incurs when it terminates each additional minute of traffic. Moreover, by dramatically lowering the total amount of intercarrier compensation, and by requiring carriers to look mostly to their own end users for network cost-recovery, the Commission will greatly reduce the practical significance of regulatory errors and will all but eliminate the risk that such errors could create incentives for arbitrageurs to specialize in terminating traffic solely to extract excessive termination rates from other carriers.

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8 Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, 9185-86 ¶ 76 (2001) ("*ISP Remand Order*"), *remanded on other grounds*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

If all intercarrier compensation rates had been based on incremental cost from the beginning, no one would have had artificial regulatory incentives to specialize in terminating traffic to ISPs in the 1990s, nor would carriers have artificial incentives, as they do today, to pump up incoming traffic volumes to inefficiently high levels by hosting free chat lines, teleconferencing services, and the like.[9]

Finally, the Commission should clarify a minor methodological point raised by footnote 708 of the *Appendix C Draft Order*. That footnote observes that "the incremental cost of terminating traffic may include certain non-traffic-sensitive costs, such as the cost of a trunk port," and it suggests that ILECs should recover such costs from interconnecting carriers through flat-rated charges outside the scope of Section 251(b)(5) rather than through per-minute charges within the scope of that provision. We agree, with the following caveat. The costs of "trunk ports" on the *interconnection* side of a tandem switch or end office switch should be recovered outside the scope of Section 251(b)(5). As footnote 708 suggests, when these trunk ports are associated with interconnection trunk groups dedicated to individual interconnecting carriers, these trunk ports should be recovered through flat-rated mechanisms. Conversely, when these trunk ports are associated with interconnection trunk groups associated with another carrier's transit tandem service, these trunk ports are shared by multiple carriers and should be recovered through usage-based mechanisms. In addition, the separate trunk ports that connect a carrier's tandem switch to its end office switches via shared transport facilities on the terminating carrier's network are also used to handle traffic sent by multiple carriers. The costs of these components are rightly considered traffic-sensitive in this context because increased traffic volumes

[9] *See, e.g., Appendix C Draft Order* ¶¶ 173-76 & n.467, ¶ 180, ¶ 234; *ISP Remand Order,* 16 FCC Rcd at 9184-86 ¶¶ 73-76; Comments of AT&T Inc., *Establishing Just and Reasonable Rates for Local Exchange Carriers,* WC Docket No. 07-135, at 12 (filed Dec. 17, 2007) ("*AT&T Traffic-Pumping Comments*").

associated with terminating traffic during the busy hour may require a carrier to install additional trunks and trunk ports to support multiple carriers' traffic. These costs, like the incremental costs of any other shared resource involved in transport and termination, should thus be subject to reciprocal compensation rates.

2. The Commission Should Mandate A Single Statewide Rate Rather Than Rates That Differ From Carrier To Carrier

The Commission should adopt the *Appendix C Draft Order*'s proposal to mandate a "single, statewide rate" rather than "a single rate per operating company" (*Further Notice* ¶ 41). As the Commission notes, U.S. regulators typically have imposed a uniform local termination rate on all carriers operating within a given geographic region. *Appendix C Draft Order* ¶ 275. When European regulators adopted rates that varied from carrier to carrier, the result was "distortions among markets," "higher retail rates for customers," and "reduce[d] consumer welfare." *Id.* ¶¶ 275-76. That is reason enough to adhere to the consistent American practice of ensuring rate uniformity for all carriers within a given geographic area—and to extend that practice to all traffic, not just traffic that has always been exchanged pursuant to Section 251(b)(5).

Even apart from that experience, there are compelling reasons to ensure uniform rates for all carriers within a state. First, the Commission has rightly proposed to base its cost methodology on the incremental costs of soft-switches, and the unit costs of soft-switches do not vary from carrier to carrier.[10] Proposals to vary termination charges from carrier to carrier may thus lack any empirical foundation in modern technology.

10 Letter from Henry Hultquist, AT&T, to Marlene H. Dortch, FCC, CC Docket Nos. 96-45, 99-68, 01-92 and WC Docket Nos. 05-337, 07-135 (filed Oct. 14, 2008); Letter from Henry Hultquist, AT&T, to Marlene H. Dortch, FCC, CC Docket Nos. 96-45, 99-68, 01-92 and WC Docket Nos. 05-337, 07-135 (filed Oct. 28, 2008).

Just as important, there is no competitively neutral way to assign different forward-looking incremental costs to different carriers. Under the Commission's approach since 1996, forward-looking costs are the costs incurred by an objectively efficient carrier.[11] Thus, a carrier claiming that its forward-looking costs are greater than an ILEC's is arguing not only that its chosen network architecture is inherently costlier than the ILEC's, but also that its network architecture is, in some highly subjective sense, *worth the extra cost*. In other words, one carrier's network could be said to have "higher" forward-looking costs than the ILEC's network only to the extent that consumers might value any additional functionality it offers that the ILEC's network does not.[12] In a free market, however, any determination of *what* consumers value and *how much* they value it should be left to consumers themselves. Shifting that inherently subjective inquiry to the regulatory process would add a chaotic new dimension to the regulatory uncertainty that has beset intercarrier compensation disputes since 1996.

More generally, allowing two carriers to charge each other asymmetric rates for call termination when they exchange traffic would force some carriers (and their consumers) to cross-subsidize other carriers (and their consumers) in competitively skewed ways that are essentially invisible to the consuming public. Indeed, European regulators originally adopted asymmetric termination rates precisely *because* they wished to create non-neutral subsidies for

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[11] *See, e.g.*, *Appendix C Draft Order* ¶ 267 (any forward-looking incremental cost study "must use the least cost, most efficient network technology"); *see also* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15848-49 ¶ 685 (1996) ("*Local Competition Order*") (adopting, as part of TELRIC, "a forward-looking economic cost methodology based on the most efficient technology," taking locations of existing wire centers as given).

[12] *See generally* Arbitration Order, *Petition of Sprint Spectrum L.P. d/b/a Sprint PCS, Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Verizon New York Inc.*, Case 01-C-0767, slip op., 2002 WL 31505732 (N.Y. P.S.C. 2002).

one group of carriers (wireless providers) at the expense of others (wireline providers).[13] Any proposal to adopt a similar scheme in this country would fly in the face of modern American telecommunications policy, which recognizes that implicit cross-subsidies—particularly those designed to give one group of competitors an artificial advantage over others—are anathema to efficient competitive entry.[14] Nor could the Commission mitigate these concerns by permitting disparate carrier-specific rates but imposing a "symmetry" rule that would require any two carriers with different rates to default to the higher rate when they exchange traffic with each other. Any such approach would produce the same types of arbitrage opportunities (such as traffic pumping or routing traffic through other carriers for reasons other than network efficiency) that have distorted the telecommunications marketplace under the existing regime.[15]

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[13] *See, e.g.*, Press Release, *Lower charges, greater consistency, more competition: Commission consults on bringing down mobile phone tariffs in Europe*, IP/08/1016 (June 26, 2008); Commission of the European Communities, *Draft Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU*, at 2-3 (2008). As noted, European regulators have recognized that these policies led to unexpected consumer harms. *See Appendix C Draft Order* ¶ 275 (asymmetric rates favoring mobile telephony discouraged efficiency to reduce costs and led to "higher retail rates for customers and lower usage of [mobile] technology").

[14] *See, e.g.*, *Local Competition Order*, 11 FCC Rcd at 15506-07 ¶ 5 (such subsidies deter and distort competition by placing some carriers at an artificial competitive disadvantage); Further Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, 4702 ¶ 33 (2005) ("*2005 Intercarrier Compensation FNPRM*") ("[A]ny new intercarrier compensation approach must be competitively and technologically neutral. Given the rapid changes in telecommunications technology, it is imperative that new rules accommodate continuing change in the marketplace and do not distort the opportunity for carriers using different and novel technologies to compete for customers.").

[15] An example illustrates the problem. Suppose that LEC 1 and LEC 2 have different termination rates: one has a rate of $0.0007, and the other a rate of $0.05. When these two carriers exchange traffic with each other, the symmetry rule would require them to default to the higher rate: each would charge the other $0.05. But LEC 2 could try to avoid paying that higher rate to LEC 1 by, for example, routing traffic to LEC 1's customers through a CLEC or other intermediary that had the same low termination rate as LEC 1 and that agreed with LEC 2 to present the traffic to LEC 1 as its own. In that scenario, LEC 1 would bill only $0.0007 from the intermediary for traffic originated by LEC 2, even though it would pay the higher termination rate for all traffic bound for LEC 2.

The only way to establish a stable long-term solution for the industry—and to avoid playing regulatory whack-a-mole as each new arbitrage opportunity arises—is to ensure a uniform termination rate for *all traffic for all carriers* within each state.

Finally, as a legal matter, nothing in the statutory language entitles any given carrier to recover its "own" incremental costs of termination if, under some proposed analysis, those costs might be higher than the forward-looking incremental costs of an efficient ILEC. In 1996, although the Commission authorized state commissions to recognize narrow exceptions to the symmetry rule, the Commission indicated that nothing in the statute requires such exceptions and that the statutory language, if anything, points in the opposite direction:

> [U]sing the incumbent LEC's forward-looking costs for transport and termination of traffic as a proxy for the costs incurred by interconnecting carriers satisfies the requirement of section 252(d)(2) that costs be determined "on the basis of a reasonable approximation of the additional costs of terminating such calls." Using the incumbent LEC's cost studies as proxies for reciprocal compensation is consistent with section 252(d)(2)(B)(ii), *which prohibits "establishing with particularity the additional costs of transporting or terminating calls."*[16]

Section 252(d)(2)(B)(ii) further prohibits the Commission or any state commission from "requir[ing] carriers to maintain records with respect to the additional costs of such calls." That clause, too, indicates that Congress wished to avoid carrier-specific calculations of "additional costs." More generally, Section 252(d)(2)(A)(i) provides only for "mutual and reciprocal recovery by each carrier *of costs* associated with . . . transport and termination." (Emphasis added.) If Congress had meant to provide for carrier-specific calculations of termination costs, it would have entitled each carrier to the recovery of "its" costs, not simply to the recovery of "costs" in the abstract.

Indeed, any contrary interpretation would be not just wrong, but at odds with the favored construction of this provision offered by the CLEC community since the 1990s. As the

[16] *Local Competition Order*, 11 FCC Rcd at 16040 ¶ 1085 (emphasis added).

Commission noted in the *Local Competition Order*, "[m]any state commissions and potential new entrants contend that symmetrical rates should be based on the incumbent LEC's costs."[17] That contention was correct then, and it remains correct today.

B. The Commission Should Reject Free Press's Proposal To Penalize ILECs With Long-Distance Or Wireless Affiliates

In an *ex parte* letter attached to the *Further Notice*, Free Press encourages the Commission to impose new limitations on an ILEC's ability to raise its SLC to compensate for a loss of access revenues if it has "long-distance and wireless" affiliates that enjoy a cost savings from comprehensive access charge reform. Free Press claims that this proposal "is based upon the principle of fairness." *Further Notice*, Appx. D, at 8. But the proposal would be neither fair nor economically sensible.

The principal flaw in Free Press's proposal is that it assumes that any wireless or long-distance company will "keep" the cost savings attributable to access charge reductions and use them to increase its profits. That is incorrect. Long distance and wireless are among the most fiercely competitive services in this industry. Under elementary principles of economics, companies offering those services will thus be forced to pass through much, if not all, of their intercarrier compensation savings to consumers, whether in the form of lower retail rates, accelerated investment in improved service quality, and/or wider deployment of innovative technology used to provide, for example, next-generation broadband services.[18] As a result, Free Press's proposal to bar an ILEC from raising its SLCs because of the passed-through "savings" of its affiliates would leave the ILEC and its affiliates *much worse off* in the aggregate than

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17 *Id.* at 16035 ¶ 1076.

18 *See, e.g.*, Richard N. Clarke & Thomas J. Makarewicz, *Economic Benefits from Missoula Plan Reform of Intercarrier Compensation*, at 18-19 (Feb. 1, 2007), attached as Exhibit 1 to *AT&T Missoula Reply Comments* (explaining why access charge reductions will be passed on to customers).

before the transition, and also much worse off than stand-alone companies competing in the same markets.

Free Press and similar groups express skepticism about the otherwise uncontroversial economic principle that industry-wide cost savings are passed through to consumers in any highly competitive market, and Free Press might thus argue for some new regulatory mechanism to determine the precise extent of any pass-through. But there could be no such mechanism unless, at a minimum, the Commission is prepared to inspect the books of each affected wireless and long-distance company. That is the hallmark of rate-of-return regulation, and the Commission could not rationally conclude, after years of deregulated pricing that has spawned record-low rates, that these markets are now in need of rate regulation. Moreover, a carrier's cost reductions can be "passed on" to consumers in a variety of ways that are not readily susceptible to quantification, such as improved service quality or innovative new services.[19] Any proposal for a pass-through mechanism would therefore require the Commission to substitute its own judgments in place of market forces to decide exactly how carriers should use the cost savings from intercarrier compensation reforms to balance the diverse and complex needs of consumers. And it would have to exercise such unprecedented and intrusive scrutiny in exceptionally competitive markets that were deregulated many years ago. That would be a fool's errand.

Moreover, quite apart from this pass-through consideration, it would make no sense to subject ILECs to differing regulatory treatment depending on their corporate relationships with

[19] *See* Twelfth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 23 FCC Rcd 2241, 2297 ¶ 124 (2008) ("Service providers in the mobile telecommunications market also compete on many more dimensions other than price, including non-price characteristics such as coverage, call quality, data speeds, and mobile data content.").

non-dominant wireless and long-distance affiliates. To the contrary, such an approach could create perverse incentives for ILECs to structure their operations so as to avoid Free Press's "affiliate penalty." That makes no sense. Consumer welfare is maximized when ILECs structure their operations in the most efficient manner possible.[20] Free Press would discourage efficiency, to the detriment of consumers, by imposing competitive burdens on ILECs and wireless carriers that elect to consolidate and by conferring competitive benefits on companies that choose to splinter into unrelated ILEC and wireless (or long-distance) entities.

Finally, even apart from the conceptual arbitrariness of imposing different SLC caps on different ILECs depending on their affiliations with other wireless or long-distance companies, Free Press's proposal would raise thorny implementation problems in practice. ILECs provide wireless and long-distance services through a variety of corporate structures and business arrangements. For example, Qwest resells other carriers' wireless services to its wireline customers, while Verizon owns only a 55% share of its wireless affiliate. If Qwest derives a benefit, even indirectly, from lower access charges paid by wireless carriers, would that benefit offset its access revenue reductions under the Free Press proposal? If not, why not? Would Verizon be penalized to the full extent of its affiliate's "savings" in access charges or simply in an amount equal to 55% of those "savings?" Would Verizon still be penalized if it owned only 25%? 10%? 1%? Would its penalty fluctuate with every decision to increase or decrease its investment in its affiliate? If so, what possible economic justification could there be for that?

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[20] *See, e.g.*, Memorandum Opinion and Order, *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, 19 FCC Rcd 21522, 21599-611 ¶¶ 201-36 (2004) (discussing potential public-interest benefits from merger of AT&T with Cingular); *see generally* R.H. Coase, THE FIRM, THE MARKET, AND THE LAW (Univ. of Chicago Press 1990); Oliver E. Williamson, THE MECHANICS OF GOVERNANCE (Oxford Univ. Press 1996).

Free Press offers no answers to these questions, and there are none. In sum, its proposal is arbitrary and economically irrational and should be rejected.

II. THE COMMISSION SHOULD MODIFY ITS PROPOSED INTERCARRIER COMPENSATION RULES IN SEVERAL RESPECTS

The proposed intercarrier compensation reforms set forth in Appendix C are fundamentally sound and are a credit to the expertise and thoroughness of the Commission's Staff. AT&T nonetheless proposes the following modifications to make the *Draft Order* stronger still, to fill in some important gaps in the rules governing the transition to the new regime, and to foreclose certain anomalies that could arise if the current draft were adopted as written.

A. The Commission Should Adopt A Five-Year Transition Timetable

The *Appendix C Draft Order* establishes a three-stage transition that would consume ten years and thus would not conclude until 2019. In the first stage, which would conclude two years after the order's effective date, carriers would incrementally lower their terminating switched intrastate access charges to interstate levels (to the extent they are higher); in the second stage, which would conclude in year four, carriers would incrementally reduce all of their terminating rates to a uniform transitional rate set by the states (again, to the extent they are higher); and finally, in the third stage, carriers would spend the ensuing six years lowering all their termination rates to low, "incremental cost" levels, as set by the states. *See Appendix C Draft Order* ¶¶ 188-92.

This ten-year transition period is an eternity by the standards of the modern telecommunications marketplace, and reform would proceed at too glacial a pace to avoid substantial industry dislocations, particularly given the accelerating erosion of the POTS business model. Like competitive bypass more generally, VoIP substitution is robust and accelerating; indeed, as discussed below, VoIP providers are projected to claim more than 45 million subscribers by the end of 2011 alone. These competitive pressures are rapidly siphoning off the per-minute revenues that support low-cost telephone service to millions of American consumers. The fault lies not with VoIP substitution, but with the antiquated regulatory regime that is collapsing under the weight of market forces, and that regime must be replaced sooner rather than later. Moreover, in the absence of prompt reform, arbitrage schemes will only multiply and intensify—as carriers seek both to *avoid paying* the subsidy-laden compensation that supports universal service today (through, for example, phantom traffic or fraudulently disguised traffic) and to *receive* more in the way of inflated compensation (through, for example, traffic-pumping schemes, to the extent the Commission does not otherwise prohibit them). The result in each case would be yet further destabilization of the industry.

In short, neither the industry nor consumers can wait until 2019 for a complete transition to a rational and sustainable regime. AT&T thus proposes to compress the three phases of the transition period, such that the first phase would end in July 2010 (and would occur in two steps, with the first step occurring in July 2009, in concert with annual ILEC access filings), the second phase would end in July 2012, and the third would conclude in July 2014. Moreover, given the limited resources of state commissions, individual states should be free to skip the second phase and proceed immediately to setting the final incremental-cost-based rate applicable to all carriers. If a state chooses this option, it would complete its rate proceeding in year three. The state would then establish a glide-path toward that final rate, which would end no later than in year five. Finally, even if the Commission chooses a ten-year transition, it should clarify that individual states may skip the second phase and establish the final incremental cost rate in year three (with the ensuing glide-path not to exceed seven years).

B. The Commission Should Clarify Its Regulatory Treatment Of IP/PSTN Traffic

1. The Commission Should Classify All VoIP Services As "Information Services" But Preclude Any Suggestion That They Are Therefore Subject to the Computer Inquiry Rules

The Commission should adopt the *Appendix C Draft Order*'s conclusion that all fixed or nomadic VoIP services capable of interconnection with the PSTN are "information services" and are thus exempt from "traditional 'telephone company' regulations" (¶ 206). That finding will resolve the many disputes about this issue that have proliferated in regulatory and judicial proceedings throughout the country. Indeed, because certainty on this issue is so important, the Commission should adopt that finding whether or not it adopts the remainder of the *Draft Order*.

This finding is also plainly correct on the merits. As the *Draft Order* recognizes, traffic that originates on an IP network and terminates on a circuit-switched network (or vice versa) is subject to net protocol conversion, either through software and hardware at the customer premises or through "gateways" that transform a circuit-switched voice signal into IP packets (or IP packets into a circuit-switched voice signal).[21] And the Commission has long concluded that a conversion that "enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol clearly 'transforms' user information" so as to render the service an information service.[22]

In addressing this issue, moreover, the Commission should go one step further. As the *Draft Order* recognizes (at ¶ 204 n.520), protocol conversion is but one basis for characterizing a service as an information service. The 1996 Act defines "information services" as those that

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[21] *Appendix C Draft Order* ¶ 204 n.520.

[22] First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, 21956 ¶ 104 (1996) ("*Non-Accounting Safeguards Order*").

offer the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[23] Following that definition, the Commission rightly classified the VoIP service at issue in the *Pulver Declaratory Ruling* as an information service because it offered various "computing" capabilities, even though the Commission made no findings about whether that service (which did not itself have a "telecommunications" component) generally involved protocol conversion.[24]

The Commission should now conclude that *all* VoIP services are information services as a categorical matter. As AT&T and many other parties have explained,[25] these services increasingly include Internet-enhanced features such as integration with instant messaging, sophisticated "talking" email in place of traditional voicemail, call- and contact-management features, and the ability to access online applications during any call. A VoIP service is not simply another means of providing traditional circuit-switched voice service, but an entirely new service made possible only "through use of an advanced IP communications network."[26] Clarifying that such services are information services *whether or not* they involve "protocol

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[23] 47 U.S.C. § 153(20). Likewise, the Commission's traditional definition of "enhanced services"—which the agency deemed synonymous with "information services" in the *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955-56 ¶ 102—includes not only a service that acts on the protocol of the subscriber's submitted information, but any service that "provide[s] the subscriber additional, different, or restructured information; or involve[s] subscriber interaction with stored information," 47 C.F.R. § 64.702(a).

[24] Memorandum Opinion and Order, *Petition for Declaratory Ruling that Pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, 3313-14 ¶ 11-12 (2004).

[25] *See, e.g.*, *Appendix C Draft Order* ¶ 205 n.525 (citing materials).

[26] Comments of the Voice on the Net (VON) Coalition, *IP-Enabled Services*, WC Docket No. 04-36, at 4 (filed May 28, 2004); *accord Appendix C Draft Order* ¶ 205 ("IP/PSTN services are not mere changes to the underlying technology used for 'existing' basic services, but are entirely new services with characteristics in many ways distinct from pre-existing telephone services.").

conversion" will help eliminate any lingering uncertainty about the regulatory status of future IP applications as they arise.

Significantly, classifying all VoIP services as "information services" should have no impact on the interconnection rules applicable to VoIP services. Section 251(a) entitles all telecommunications carriers to interconnect with other telecommunications carriers, regardless of the traffic they exchange. And that entitlement extends to carriers, such as CLECs, that serve VoIP providers.[27] To be sure, some VoIP providers and their CLEC partners may need to adjust their relationships to ensure that the entity interconnecting with the PSTN qualifies as a CLEC providing *telecommunications services*. But as long as it is the CLEC that seeks such interconnection, the ILEC's interconnection obligations and any additional obligations under Section 251(b) will apply to the same extent as they do today with respect to any other interconnecting carrier.

Finally, the Commission should confirm that classifying VoIP services as information services does not somehow subject those services to the *Computer Inquiry* rules. Those rules (among other things) required any common carrier to "unbundle" each of its information services—that is, to strip out the underlying telecommunications component, tariff it, and offer it for sale on a common carrier basis to other would-be providers of information services.[28] The Commission adopted these rules in the pre-Internet era of the 1980s, when, with few exceptions, incumbent telephone companies owned the only transmission facilities over which information

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[27] *See* Memorandum Opinion and Order, *Time Warner Cable Request for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, 22 FCC Rcd 3513 (2007) ("*Time Warner Order*").

[28] *See* Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14867-71 ¶¶ 23-28 (2005) ("*Wireline Broadband Order*") (summarizing rules), *aff'd*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

services could be run. Today, because information services and their underlying telecommunications components are subject to vigorous competition, and because regulation would thus do more harm than good, the Commission has eliminated the application of the *Computer Inquiry* rules for a wide range of services, including all broadband Internet access services and many enterprise broadband services.[29]

Given this backdrop, it would be nonsensical to begin applying these monopoly-era rules to VoIP services, which are even more phenomenally competitive than the information services the Commission has already exempted from those rules. As noted, cable operators already *provide* VoIP service to more than 16 million subscribers, and they *offer* such service to more than 100 million customers.[30] Over-the-top VoIP providers such as Vonage, Skype, and Packet8 serve many millions of additional customers—indeed, Vonage alone serves 2.6 million.[31] All of these providers won this business without once relying on the *Computer Inquiry* rules. In short, there can be no credible argument for applying those rules to VoIP services for the first time, whether such services are offered over the public Internet (as Vonage and other over-the-top services are) or over IP-based transmission paths (as the VoIP services of cable companies and some telcos are). To avoid any prospect for regulatory confusion, however, the Commission

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29 *Wireline Broadband Order*, 20 FCC Rcd at 14875-77 ¶¶ 41-42; Memorandum Opinion and Order, *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services,* 22 FCC Rcd 18705, 18733-35 ¶¶ 53-58 (2007).

30 *See* NCTA Broadband Deployment Statistics, *available at* http://www.ncta.com/Statistic/Statistic/Statistics.aspx (noting that, as of March 2008, there were more than 16.5 million cable voice/phone customers); United States Department of Justice, *Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers*, at i, 33 (Nov. 2008), *available at* http://www.usdoj.gov/atr/public/reports/239284.pdf ("Cable companies today offer telephone services to more than 100 million U.S. households (or over 80 percent of households)").

31 Vonage Holdings Corp., Form 10-Q, at 13 (Nov. 10, 2008).

should confirm the inapplicability of those rules to VoIP at the same time it declares VoIP an "information service."

2. The Commission Should Adopt Transitional Compensation Rules For The Exchange Of IP/PSTN Traffic

Under the *Appendix C Draft Order*, all IP-PSTN traffic will eventually be subject to uniform reciprocal compensation rates at the conclusion of the multi-year transition. But the *Draft Order* proposes to "maintain the status quo for this traffic during the transition" (¶ 213 n.555)—which, if not compressed (as it should be), could last as long as ten years. That approach is untenable, because there is no agreed-upon "status quo" to "maintain."

As the Commission knows, providers have disagreed for many years about whether and when VoIP traffic—which LECs terminate over the PSTN in exactly the same way they terminate all other traffic—should be subject to access charges under existing rules. Even worse, some CLECs that serve VoIP providers try to game the system by imposing access charges on the PSTN/IP traffic they *terminate* to their VoIP provider customers while insisting that they should pay only reciprocal compensation charges on the IP-to-PSTN traffic that *originates* from their VoIP providers. The result of this confusion is a spate of resource-consuming arbitration and litigation in many forums, divergent state-commission decisions,[32] and at least three different regulatory proceedings now pending before the Commission, including two forbearance matters.[33]

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[32] *See* Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers *Regarding Access Charges and the "ESP Exemption*," WC Docket No. 08-152, at 19 (filed July 23, 2008) ("*AT&T Declaratory Ruling Petition*") (describing Arkansas and Wisconsin decisions).

[33] *Petition of the Embarq Local Operating Companies for Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b), and Commission Orders on the ESP Exemption*, WC Docket No. 08-8 (filed Jan. 11, 2008); *Petition of Feature Group IP for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.70(a)(1), and Rule 69.5(b)*, WC Docket No. 07-256 (filed Oct. 23, 2007).

These problems can only multiply as IP-based services continue their explosive growth trend. As AT&T has previously explained, the number of VoIP subscribers served by just three of the leading cable voice providers grew by more than *80 percent* in 2007, from 4.9 million subscribers at the end of 2006 to approximately 8.9 million subscribers at the end of 2007, and IDC estimates that the number of *total* VoIP subscribers will expand from the 16 million that were served in 2007 to *more than 45 million* by the end of 2011.[34] As this traffic expands, vastly increasing amounts of IP-originated traffic will be terminated on the PSTN and vice-versa. The financial consequences for the affected carriers could not be starker. In the absence of Commission guidance, carriers would have no choice but to engage in whatever self-help the law permits, subject, as always, to litigation and regulatory uncertainty.

In short, maintaining the status quo for even another year would destabilize the entire industry. And the consequences would be even more severe if these issues remain unresolved for longer, as would likely be the case if the Commission were to pass now on the opportunity to act. The Commission should therefore adopt a clear transitional regime for IP/PSTN traffic, just as it has for ISP-bound traffic, and thereby ensure that adoption of the *Draft Order* will create immediate certainty for *all* traffic and *all* players throughout the industry. Indeed, as AT&T has proposed in a pending petition for declaratory ruling, the Commission should adopt rules for IP/PSTN traffic even *apart* from what it does for other traffic, given the rapid industry transition to VoIP.[35]

If the Commission adopts the Appendix C framework, it should immediately impose the following transitional rules for IP/PSTN traffic:

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34 *See AT&T Declaratory Ruling Petition* at 21 (citing various sources, including IDC reports).

35 *See generally id*.

- *All* "interexchange" IP/PSTN traffic (including both interstate and intrastate interexchange traffic) should be subject to interstate access charges.[36]

- All "local" IP/PSTN traffic should be subject to reciprocal compensation.

- Once the states set the interim reciprocal compensation levels, all IP/PSTN traffic will be subject either to those interim rates or to the existing rates (whichever are lower), and such traffic will ultimately transition to the state uniform reciprocal compensation rate along with all other traffic.

This framework generally accords with the compromise approach proposed in AT&T's petition for interim declaratory ruling on VoIP access charges.[37]

As AT&T demonstrated there and in other filings,[38] this framework is fully consistent with all applicable law, and the Commission's proposed finding that any VoIP service is an "information service" would not alter that conclusion. In a nutshell, access charges properly apply today to interexchange traffic that is delivered to the PSTN, regardless of its classification,

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36 Given the nomadic characteristics of certain VoIP services, as well as the non-geographic assignment of telephone numbers by some VoIP providers, call-detail records (*e.g.*, calling and called party numbers) may not be a perfect mechanism for determining whether a particular call is "interexchange" for intercarrier compensation purposes. *See 2005 Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4696-97 ¶ 22. Existing LEC tariffs and interconnection agreements already address this issue, however, because they contain certain mechanisms, which have been approved by state commissions and/or this Commission, to rate traffic for intercarrier compensation purposes where call-detail records are incomplete or inaccurate (for example, through factors such as percent interstate use (PIU) and percent local use (PLU)). *See AT&T Declaratory Ruling Petition* at 33-35. These types of mechanisms could be used to identify "intrastate" interexchange IP/PSTN traffic separately from all other intrastate interexchange traffic in order to apply interstate access charges to such IP/PSTN traffic during the transition.

37 *Id.* In that petition, AT&T advocated a slightly different result: a ruling that the application of intrastate access charges to IP/PSTN traffic does not conflict with federal policy if such charges are set at or below interstate access charge levels.

38 *See, e.g.,* AT&T Comments, *Level Three Communications, LLC, Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5*, WC Docket No. 03-266 (filed Mar. 1, 2004); Comments of AT&T Corp., *IP-Enabled Services*, WC Docket No. 04-36 (May 28, 2004); AT&T Comments, *Feature Group IP Petition for Forbearance Pursuant to 47 U.S.C. §160(c) from Enforcement of 47 U.S.C. §251(g),Rule 51.701(b)(1), and Rule 69.5.5(b)*, WC Docket No. 07-256, and *Embarq Local Operating Companies Petition for Limited Forbearance Under 47 U.S.C. §160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b), and Commission Orders on the ESP Exemption*, WC Docket No. 08-8 (Filed Feb. 19, 2008).

and there is no merit to arguments that the "ESP exemption" somehow prescribes a different outcome. That exemption was adopted to enable enhanced service providers to purchase local business lines out of state tariffs in order to communicate *with their own customers.* It was never intended to exempt any entity from paying access charges to an ILEC for terminating a call to the *ILEC's* customers on the PSTN in exactly the same way the ILEC terminates calls delivered by conventional circuit-switched interexchange carriers.[39] That conclusion is particularly compelling where the entity delivering the IP traffic to the ILEC is not itself acting as an information services provider purchasing local business lines for its own use, but as a wholesale provider of *telecommunications services* (such as a CLEC that partners with a VoIP provider) and is delivering traffic to the ILEC over a local interconnection facility.[40] Those carriers have been guaranteed interconnection rights under Section 251 precisely because they are "telecommunications carriers," not information service providers. It is irrelevant that the traffic these CLECs deliver is an information service from the perspective of the VoIP subscriber that originates the call; as the Bureau has found, those CLECs' status is unaffected by the "statutory classification of a third-party provider's VoIP services."[41]

In sum, interexchange VoIP calls terminated on the PSTN are access calls and should be treated as such during the transition to a unified termination rate. Specifically, they should be

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39 First Report and Order, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, 12 FCC Rcd 15982, 16132-33 ¶ 343 (1997) ("*Access Charge Reform Order*") (explaining that the ESPs for whom the exemption was devised "use incumbent LEC networks to receive calls from their customers") (emphasis added), *pets. for rev. denied*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

40 *See* Memorandum Opinion and Order, *Northwestern Bell Telephone Company Petition for Declaratory Ruling*, 2 FCC Rcd 5986, 5988 ¶ 21 (1987) (ESPs purchasing transmission services from carriers to be used as inputs into the ESPs' services do "not thereby create an access charge exemption for those carriers"), *vacated on other grounds*, 7 FCC Rcd 5644 (1992).

41 *Time Warner Order*, 22 FCC Rcd. at 3520-21 ¶ 15.

treated as *interstate* access traffic as opposed to some combination of interstate and intrastate traffic. In many states, intrastate access charges have not been subject to the same reform as their interstate counterparts and remain replete with implicit subsidies. Moreover, since the Commission's transition plan already will rapidly move intrastate rates to interstate levels as well, it makes sense to move IP/PSTN traffic directly to interstate levels, which would immediately reduce arbitrage opportunities for this important class of traffic. Until interstate and intrastate rates are unified, carriers could use factors to identify the percentage of their intrastate interexchange traffic that should be subject to the IP/PSTN intercarrier compensation rules (*see* note 36, *supra*). And this interim plan would not necessarily require any change to carriers' interconnection facilities for VoIP traffic: CLECs could continue to use interconnection trunks to terminate their IP/PSTN traffic (or vice versa), even though the traffic would be subject to interstate access rates.[42]

Finally, at a bare minimum, the Commission should prohibit providers from insisting on asymmetrical compensation schemes for IP/PSTN traffic, under which they would *pay* reciprocal compensation rates for interexchange IP/PSTN traffic they originate but *receive* access charges for interexchange PSTN/IP traffic they terminate. In particular, the Commission should make clear that providers can charge no more for terminating a PSTN-to-IP call than they agree to *pay* when they originate an IP-to-PSTN call that is rated similarly. The Commission should declare

[42] At the same time, the Commission should ensure that IP/PSTN traffic that is currently rated as "local" traffic—which is true of a large degree of "fixed VoIP" traffic provided by cable companies—is not subjected to a sudden increase from local reciprocal compensation rates to access rates. As the Commission has found, it may subject any traffic within its jurisdiction to the state arbitration framework under Sections 251(b)(5) and 252(d)(2). Doing so here will ensure that IP/PSTN traffic, like all other traffic subject to the new regime outlined by the *Draft Order*, will not be subject to rate *increases* as a result of the new transitional plan. *See, e.g.*, *Appendix C Draft Order* ¶ 187-92 & n.492 (explaining that carriers whose rates are below the interim rates may not increase their rates).

that the alternative “heads I win, tails you lose” approach some CLECs advocate is an unjust and unreasonable practice that violates Section 201 of the Act.[43]

C. The Commission Should Put An Immediate End To Traffic-Pumping Schemes

Another intercarrier compensation problem that requires a prompt and comprehensive solution is the recent proliferation of “traffic-pumping” schemes. The carriers involved in such schemes are unscrupulous ILECs and CLECs in mostly rural areas whose access charges were set at very high levels on the assumption that traffic volumes in those areas would be low and the carriers’ average costs would therefore be high. In the typical scheme, a LEC artificially inflates the volume of its access traffic by establishing revenue-sharing arrangements with, for example, chat-line and conference-call companies that locate their facilities in its serving area. In turn, these companies typically give away their services for free in order to maximize the access minutes they generate and thus the resulting access revenues they share with the LEC. This flood of access calls defeats the low-traffic-volume assumption underlying the LEC’s high access charges, and it thus supplies the LEC with windfall profits in the form of radically above-cost intercarrier compensation. These windfall profits are financed by AT&T and other interexchange carriers—and ultimately by the customers of those carriers. The net result is a massive wealth transfer from ordinary Americans to these arbitrageurs.

Both the number and the magnitude of traffic-pumping schemes have mushroomed over the past two years. Lawsuits, investigations, and case-by-case tariff suspensions have been inadequate to remedy the problem. The traffic-pumping arbitrageurs have adapted quite nimbly to regulatory intervention; as the Commission shuts down one scheme, others pop up in different places or between different entities. It is particularly difficult to combat schemes operated by

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[43] *See AT&T Declaratory Ruling Petition* at 7.

CLECs, which account for more than 75% of the traffic-pumping minutes billed to AT&T, in part because the access charges of CLECs are less closely regulated than those of ILECs.[44] In addition, perpetrators of traffic-pumping schemes can easily start new CLECs to replace those whose activities the government has halted. And because CLEC rates are set out in tariffs filed on a streamlined basis, CLECs engaged in traffic pumping argue that, even after their conduct and rates have been found unlawful, they should be shielded from paying refunds by the "deemed lawful" status of their tariffs under Section 204(a)(3).[45]

As AT&T has explained,[46] the Commission can effectively resolve the traffic-pumping problem only through preemptive measures that target the perverse economic incentives that give rise to such schemes. At a minimum, the Commission should adopt the joint proposal filed by the Rural Independent Competitive Alliance and AT&T on November 25th, 2008. The proposal outlines general rules to address the problem of traffic pumping, including the following proposed declaratory ruling governing revenue sharing:

> It shall be an unjust and unreasonable practice for any LEC to assess terminating interstate switched access charges on traffic that is subject to a revenue sharing arrangement. A "revenue sharing arrangement" is any arrangement between a LEC and a calling provider whereby (i) the LEC compensates a calling provider to direct calls to or through a LEC's local exchange and (ii) the arrangement can be expected over its term to produce net payments from the LEC to the calling provider. "Calling provider" means any entity, including any affiliate of a LEC, that promotes or advertises to end users telecommunications services or information services and that provides or uses a LEC's telephone numbers for such services to be routed to or through a LEC's local exchange.[47]

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44 *See AT&T Traffic-Pumping Comments* at 3, 11-12; Letter from Brian Benison, AT&T, to Marlene H. Dortch, FCC, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, at 3-4 (Apr. 25, 2008).

45 *See AT&T Traffic-Pumping Comments* at 8-10 (discussing arguments).

46 *See, e.g.*, *id.* at 2-3.

47 *See* Letter from Brian Benison, AT&T, and Steve Kraskin, RICA, to Marlene Dortch, FCC, *Developing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135 and CC Docket No. 01-92, Attachment at 2 (filed Nov. 25, 2008).

Indeed, the Commission already has tentatively concluded that the sharing of access revenue is an unjust and unreasonable practice for rate-of-return carriers,[48] and it should adopt that ruling for all carriers no matter what other steps it takes in pursuit of broader intercarrier compensation reform.

D. The Commission Should Confirm That The "Mirroring Rule" Does Not Apply To Access Traffic

Under the "mirroring rule" established in 2001 and affirmed in the *Draft Order*, an ILEC may avail itself of the $0.0007 termination rate for ISP-bound traffic "only if it offers to exchange all traffic subject to Section 251(b)(5) at the same rate." *Appendix C Draft Order* ¶ 193; *see id.* ¶ 198. In 2001, the Commission defined the "traffic subject to Section 251(b)(5)" for purposes of this mirroring rule to exclude an ILEC's access traffic.[49] The *Draft Order* now concludes—properly, in AT&T's view—that Section 251(b)(5) "is broad enough to cover access traffic" as well as the "local" traffic to which the Section 251(b)(5) rules were traditionally confined.[50] The scope of Section 251(b)(5) is subject to Section 251(g), which "preserve[s] the pre-1996 Act regulatory regime that applies to access traffic" until the Commission affirmatively acts to bring such traffic within the scope of Section 251(b). *Appendix C Draft Order* ¶ 215.

The *Draft Order* indicates in one passage that preservation of the mirroring rule is intended solely to foreclose increases to "reciprocal compensation rates for traffic currently subject to the mirroring rule." *Appendix C Draft Order* ¶ 198. To avoid ambiguity, the Commission should confirm that, during the transition, ILECs need not flash-cut all of their

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48 Notice of Proposed Rulemaking, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, 22 FCC Rcd 17989, 17997 ¶ 19 (2007).

49 *ISP Remand Order*, 16 FCC Rcd at 9193-94 ¶¶ 89-90.

50 *Appendix C Draft Order* ¶¶ 221-22 (access traffic); *id.* ¶¶ 212-15 (not limited to local traffic).

access charges to $0.0007 in order to take advantage of that rate for ISP-bound traffic. By concluding that the Commission will exercise its authority under Section 251(g) to bring access traffic within the scope of Section 251(b)(5), the *Draft Order*, as currently written, might be misconstrued as extending the mirroring rule—which covers "all traffic subject to Section 251(b)(5)"—to apply to such traffic as well. Of course, if the mirroring rule *were* extended to access traffic, ILECs either would confront an immediate loss of billions of dollars in access revenues or would be forced to abandon reliance on the $0.0007 rate that has governed ISP-bound traffic for many years. Neither result would make sense, and presumably neither is intended. The Commission should obviate any destabilizing regulatory uncertainty on this point by making clear that it wishes merely to preserve the regulatory status quo, not to take the additional radical step of extending the mirroring rule to access traffic.

E. The Commission Should Modify Its Proposed "Measures To Ensure Proper Billing"

As AT&T has previously explained, phantom traffic—traffic for which a carrier cannot accurately bill—is endemic to today's intercarrier compensation regime because (among other considerations) artificial disparities in termination rates give each originating carrier incentives to game the system by disguising the nature of its traffic.[51] Phantom traffic will be less of a problem once a uniform termination rate is in place, but it will remain a problem during much of the transition and to some extent thereafter. By requiring the transmission of specified signaling information to the terminating carrier, the *Draft Order* takes a number of the steps needed to fix the problem.

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[51] *See, e.g.*, Reply Comments of the Supporters of the Missoula Plan on Their Phantom Traffic Proposal, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, at 1-4 (Jan. 5, 2007)**;** *Missoula Plan*, Section V, at 56.

The *Draft Order* appropriately adopts signaling requirements that accord with standard industry practice concerning call-signaling content. Consistent with this approach, the Commission has recognized that carriers must be free to depart from the call-signaling content rules in certain limited circumstances.[52] And the Missoula Plan identified several specific situations in which "standard industry practice" involves a departure from the typical content guidelines.[53] The Commission should clarify that its understanding of the "limited exception[s] . . . needed . . . where industry standards permit" includes those laid out in the Missoula Plan—and not just the lone example offered by Verizon and cited in the *Draft Order*.[54] For example, literally construed, the *Draft Order* would entitle a terminating carrier to bill calls at the highest terminating rate whenever it lacks some of the required signaling information.[55] But it would be unfair to apply that rule to calls originated abroad, since carriers have no control over call-signaling content for such calls. In sum, the Commission should incorporate the discussion in the Missoula Plan in order to avoid disputes about the reach of "standard industry practice."

To avoid creating a new set of regulatory anomalies in the context of "transit" traffic, the Commission should also modify the related rules the *Draft Order* proposes for carriers' financial responsibility.[56] Specifically, the Commission should make clear that terminating carriers may not elect, on a call-by-call basis, which carrier to charge for the costs of termination; if they charge transit providers for *some* calls, they must charge them for *all* calls.

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52 *Appendix C Draft Order* ¶¶ 326-31.

53 *Missoula Plan*, Section V.B, at 57.

54 *Appendix C Draft Order* ¶ 331.

55 *Id.* ¶ 322.

56 In a transit arrangement, an intermediate local provider (the transit carrier) routes calls that it receives from another carrier (an originating or interexchange carrier) through its network and delivers those calls to the terminating carrier serving the called party.

There are two plausible ways to structure intercarrier compensation in the transit context. First, the Commission could adopt the compensation structure now used in the access context when two carriers cooperate to terminate an access call—*e.g.*, when an ILEC switches and transports a call received from an interexchange carrier to a point on the network of a terminating LEC. In that context, the ILEC and the terminating LEC independently collect their respective shares of the compensation *directly from the interexchange carrier*. Second, the Commission could adopt the different compensation structure sometimes used today for "local" traffic. Under that structure, the terminating carrier recovers its costs from the transit provider, and the transit provider in turn collects the full price of its service (which includes the call-termination functions performed by the terminating carrier as a wholesale input) from the carrier that hired it to deliver calls to the terminating carrier.

AT&T does not object to the adoption of the latter compensation structure as a default rule for all traffic so long as the Commission removes any vestige of the *other* compensation structure, under which the terminating carrier may sometimes recover directly from the carrier responsible for payment (the carrier delivering the call to the transit provider). In other words, if the Commission permits a terminating carrier to recover from a transit provider (which in turn recovers from the carriers that deliver traffic to it), the Commission should make clear that the terminating carrier must *always* recover from the transit provider for *all calls* (unless the parties reach a different, negotiated agreement). The Commission should also make clear that the terminating carrier may not vary that compensation structure on a call-by-call basis, charging the ultimately responsible carrier directly for some calls and the transit carrier for other calls, such as those that lack the signaling information the terminating carrier needs for direct billing of the carrier with ultimate financial responsibility.

Any such hybrid, call-by-call scheme would be wasteful and ultimately unworkable. If an intermediate carrier is to offer transit services at all, it must have the same freedom as any common carrier to sell a well-defined service on clear terms to any willing purchaser. The purchaser (*i.e.*, the originating or interexchange carrier) must have certainty about what it is buying and from whom. And the transit provider must have certainty about what charges it is collecting and what charges it is paying for any wholesale inputs (such as the call-termination function provided by the called party's LEC). The Commission would destroy any prospect of such certainty, dramatically increase administrative costs, and ultimately undermine transit arrangements if it suggested that terminating carriers may sometimes be entitled to demand payment from originating or interexchange carriers and sometimes from transit providers.

The Commission should thus amend the language in paragraphs 333 through 337 of the *Appendix C Draft Order* to make clear that, as a default rule, termination charges for all transit traffic will be paid by transit providers, who, in turn, will recover their various costs from the carriers delivering the traffic to them. Transit carriers could set their rates to cover not only the transit function itself, but also the costs (plus a reasonable profit) of their billing and collection services and the various termination charges applicable to the traffic they carry. This arrangement would eliminate the substantial administrative burdens and disputes associated with indirect interconnection arrangements today. For example, carriers choosing indirect interconnection no longer would be required to engage in the expensive and time-consuming process of negotiating and managing a multitude of traffic-termination agreements with terminating carriers.

Under AT&T's proposal, this transit traffic compensation structure would be implemented in two steps. First, within twelve months of the effective date of the order, transit providers would implement it for all non-access traffic, including ISP-bound traffic.[57] For all other traffic, the structure would be implemented in the fifth year of AT&T's proposed five-year transition, when all terminating compensation charges are unified.

F. The Commission Should Clarify An Ambiguity In Its Discussion Of Constraints On Federal SLC Increases

In paragraph 294 of the *Appendix C Draft Order*, the Commission proposes that an ILEC recover its net loss in intrastate access revenues by looking first to its state retail rates and any intrastate SLCs. Under this approach, an ILEC could not increase its federal SLC up to the relevant caps to recover its intrastate access revenue shift unless and until it first increases its intrastate retail rates or intrastate SLC to the extent permitted under state law. Once it has done so, any remaining loss could be recovered in any remaining permitted federal SLC increase.

If the Commission adopts this proposal, it should clarify (or, to the extent necessary, modify) it in certain important respects to avoid unintended anomalies in application. In its current form, the *Draft Order* does not make clear how an ILEC's increase in state-level retail rates, on the one hand, and restrictions on its ability to increase the federal SLC, on the other hand, correlate with each other across customers or groups of customers. The current language thus could be construed in such a way as to seriously distort competition and require some groups of customers to bear a disproportionate share of the burden of rebalancing state rates, just as the Commission takes decisive steps to rationalize universal service across the board.

The following examples illustrate the ambiguity:

<u>Example 1</u>:

- Assume $2 in average intrastate access revenue loss per line
- Assume that the ILEC's residential rates in the state are fully constrained

57 During the transition to unification of terminating rates, all traffic currently subject to the jointly provided access records exchange process would remain subject to that process.

- Assume that business rates are fully deregulated
- Assume that business lines make up 20% of the lines in the state

Would the ILEC be required to raise the rates for every business customer line by $10 (in order to produce the equivalent of a $2 increase for every line) in lieu of recovering its intrastate access shift from federal SLC increases—thereby forcing business customers to bear the entire burden of the access shift?

<u>Example 2</u>:

- Assume $2 in average intrastate access revenue loss per line
- Assume that the rates for 50% of the residential consumers in the state are fully constrained
- Assume that the rates for the remaining 50% of consumers are unconstrained to a degree and would allow a price hike of up to $4

Would the ILEC have to raise the rates for the second group of consumers by $4 (rather than looking to the federal SLC after a $2 increase)—forcing one group of consumers to bear the entire burden of the access shift and subsidize all the consumers in the state?

In both cases, the outcome could be inefficient and unfair: one group of customers could be asked to bear the entire intrastate access shift and to subsidize other customers that are shielded from that burden. The Commission accordingly should clarify that resort to the federal SLC increase is available with respect to any lines for which the ILEC has no intrastate pricing flexibility, without regard to potential increases that might be applied to lines with *unconstrained* pricing flexibility;[58] increases on the rates for the latter lines are required only to make up for the average access revenue loss per line on *those* lines.

[58] In some cases, a state may have provided pricing flexibility for a specific purpose (*e.g.*, to compensate for a reduction in the state's universal service funding mechanism outside the *Draft Order*'s framework). If an ILEC in such a state increases its rates in an exercise of that targeted

The Commission also should clarify a point that is now implicit in the relevant language in the *Draft Order*—that under the rule, the maximum required increase in intrastate rates per line would be the lesser of the average intrastate access revenue loss per line and the difference between the existing interstate SLC and the new SLC cap. Plainly, by limiting the amount by which the federal SLC must rise before an ILEC is entitled to federal USF support to offset lost intrastate access revenues, the Commission has sought to limit increases to end-user prices, pending resolution of the items it referred to the separations joint board. Consistent with that view, the Commission likewise should limit the amount by which intrastate rates must increase before an ILEC may look to the federal SLC to offset lost intrastate access revenues.

III. UNIVERSAL SERVICE

A. The Commission Should Adopt A Forward-Looking High-Cost Fund That Supports Deployment Of Broadband Facilities

As Congress recognized in 1996, rational, predictable, and appropriately targeted universal service funding is critical to supporting the public telecommunications network and to ensuring that all Americans share in the technological innovations that are changing the face of the communications industry. The *Draft Order* adopts several key reforms that will help advance these goals and eliminate some of the problems that have plagued the universal service system for years. As discussed below, it caps the fund and eliminates duplicate CETCs, thereby ensuring that the fund is "specific and predictable" and capable of supporting the high-quality network and affordable rates Congress envisioned.[59] And it re-focuses the high-cost fund to encourage the deployment of the network infrastructure necessary for the provision of broadband

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pricing flexibility, that rate increase should *not* be counted toward recovering the intrastate access loss resulting from the Commission's reform of intercarrier compensation.

[59] 47 U.S.C. §§ 254(b)(5), (1); *see also* Comments of AT&T, Inc., *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337 and CC Docket No. 96-45, at 23-24, 40 (filed Apr. 17, 2008) ("*AT&T USF NPRMs Comments*").

Internet access services, thus putting in place a framework that can help to improve "[a]ccess to advanced telecommunications and information services" in many high-cost areas.[60]

As a preliminary matter, the *Appendix C Draft Order* would halt the rapid growth of the high-cost fund. The identical support rule and the proliferation of CETCs have dramatically expanded the fund and have diverted universal service funding from one of its core purposes: ensuring that all Americans have access to rapid, efficient communications service at reasonable charges.[61] Indeed, as the Tenth Circuit recognized and the *Draft Order* reiterates here, "excessive subsidization" is ultimately financed by end users and may impair "the affordability of telecommunications services, thus violating the principle in [Section] 254(b)(1)."[62] The *Draft Order* addresses this concern by capping the total amount of high-cost support (except for rural rate-of-return carriers) and eliminating support for CETCs. AT&T further supports the *Draft Order*'s recognition that CETC support should be phased out gradually, rather than on a flash-cut basis.[63] As AT&T has previously explained, this gradual approach will best achieve Congress's mandate for *predictable* universal service support.[64] AT&T therefore urges the Commission to adopt the five-year transition to the elimination of CETC funding that was proposed in the CTIA

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60 47 U.S.C. § 254(b)(2). As discussed below, the *Draft Order* conditions existing high-cost funding on broadband deployment but is silent on whether and how the Commission would target support for broadband deployment in high-cost and rural areas served by "non-rural" carriers that do not currently receive high-cost support (due to the Commission's flawed high-cost model mechanism). Consequently, adopting the *Draft Order*'s broadband-related high-cost provisions is just the first of several steps that the Commission would have to take to ensure ubiquitous broadband Internet access service throughout America.

61 47 U.S.C. § 151.

62 *Appendix C Draft Order* ¶ 15 (citing *Qwest Commc'ns Int'l Inc. v. FCC,* 398 F.3d 1222, 1234 (10th Cir. 2005) ("*Qwest II*")).

63 *See Appendix C Draft Order* ¶ 52.

64 47 U.S.C. § 254(b)(5); *see AT&T USF NPRMs Comments* at 23-24, 40.

October 22, 2008 *ex parte*, attached in Appendix D and incorporated into the *Appendix C Draft Order*.

As the *Draft Order* notes, elimination of current CETC support—much of which has supported the provision of wireless services—leaves open the question of what mechanism may best encourage deployment and maintenance of the facilities necessary for the provision of advanced mobile services in high-cost and rural areas.[65] As explained in AT&T's April 17, 2008 Comments on the USF NPRMs, the Commission should transition legacy CETC funding (as it is eliminated over the five-year phase-down) to a new Advanced Mobility Fund designed to support mobile wireless broadband deployment in unserved areas.[66] Under this approach, providers of mobile wireless broadband Internet access would apply for funding to support the provision, maintenance, and upgrade of facilities for the provision of advanced mobile services to Commission-identified unserved areas. Initially, all legacy CETC funding transitioned to the new mechanism would be earmarked to support advanced mobile service projects in the state where support previously was provided. When consumers in all areas of that state have access to such services, support would be released to fund the provision, maintenance, and upgrade of facilities that provide advanced mobile services in the unserved areas of other states. AT&T's proposal offers the Commission a clear and administratively simple roadmap for transitioning and targeting legacy CETC funding to areas that currently lack advanced mobile services.

Moreover, AT&T supports the Commission's efforts to reform existing high-cost support mechanisms to encourage and support the universal deployment of facilities necessary to provide *wireline* broadband Internet access services. As AT&T has previously noted, that reform is necessary to ensure that all Americans, including those in high-cost areas, share the benefits of

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65 *Appendix C Draft Order* ¶ 339.

66 *AT&T USF NPRMs Comments* at 3, 5, 40-41.

high-speed Internet access and related services, as Congress envisioned in Sections 254 and 706.[67] In its April 17 USF Comments, AT&T also recommended that the Commission implement this new approach by adopting a competitive application process, under which interested fixed-location broadband Internet access service providers would apply to provide broadband and voice services to Commission-identified unserved areas. In its *Appendix C Draft Order*, the Commission instead proposed a variation on this proposal: a reverse-auction approach under which each ILEC must declare whether it will offer broadband Internet access service at a minimum speed (in addition to the services included in the existing universal service definition) throughout its study area. Under the Commission's proposal, if an ILEC is unwilling or unable to make this commitment, the Commission will conduct a reverse auction to see if any other provider is willing to replace the existing ILEC as the carrier of last resort (COLR) *and* commit to provide broadband Internet access service throughout the existing ILEC's study area with universal service support capped at the amount currently provided to the existing ILEC. The winning bidder must assume all of the losing ILEC's COLR obligations and commit to offer broadband service throughout the ILEC's study area within ten years.[68]

If the Commission adopts this proposal, it must ensure that any ILEC that loses its federal high-cost support through a reverse auction is relieved of its state-imposed COLR obligations.[69] No other approach makes sense, since the ILEC will no longer be receiving the critical federal support it needs to provide universal service in the relevant areas. The Commission proposes to

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67 *See generally AT&T USF NPRMs Comments*; Comments of AT&T Inc., *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337 and CC Docket No. 96-45 (filed May 31, 2007).

68 *Appendix C Draft Order* ¶¶ 4, 12.

69 *See AT&T USF NPRMs Comments* at 34-35; Reply Comments of AT&T, Inc., *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service,* WC Docket No. 05-337 and CC Docket No. 96-45, at 18 (filed June 2, 2008) ("*AT&T USF NPRMs Reply Comments*").

address this issue by requiring winning bidders to assume "all of the [COLR] obligations of the incumbent LEC for [the ILEC's] study area, whether such obligations are imposed on the LEC pursuant to state or federal law."[70] But the Commission is silent about *how* it proposes to ensure that such state-law obligations will shift to winning bidders and (more importantly) how incumbents will be relieved of those obligations. Accordingly, to remove any uncertainty about this aspect of the Commission's proposal, the Commission should be explicit about how it will accomplish this transfer of state-imposed requirements.

Finally, the Commission should address how its *Appendix C Draft Order* relates to the issues raised by the Tenth Circuit in its *Qwest II* decision and quickly issue a separate order resolving any such issues that may remain following adoption of the *Draft Order*. Auctioning high-cost support may well be an effective means to spur broadband network deployment in those ten states where so-called "non-rural" carriers receive high-cost model support, but it does nothing to address the inadequate—or nonexistent—high-cost funding provided to non-rural carriers to serve rural and other high-cost areas in most states. Indeed, if the Commission takes no action on the Tenth Circuit's remand but caps the high-cost fund and limits high-cost dollars to those states where carriers receive them today (as proposed by the *Draft Order*), it will only perpetuate the flaws of the non-rural carrier funding mechanism and undermine the ability of non-rural carriers to offer broadband service in their high-cost and unserved areas. AT&T urges the Commission to act promptly on this remand, which has been pending at the Commission for over three and a half years.

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70 *Appendix C Draft Order* ¶ 39.

B. The Contribution Methodology In The *Appendix B Draft Order* Should Be Adopted With Certain Modifications

With just a few modifications, the contribution methodology proposed in the *Appendix B Draft Order* will provide long-overdue stability to the universal service fund, clarity to consumers, and certainty to providers, the Commission, and the Universal Service Administrative Company ("USAC"). Under this proposal, the Commission would assess contributors based on all of their NANP telephone numbers—residential and business telephone numbers alike—and their interstate dedicated business connections. In an *ex parte* letter filed on November 21, 2008, AT&T detailed a few improvements that the Commission should make to this proposal.[71] Specifically, AT&T recommended that the Commission modify the capacity/assessment tiers for the business connection assessment, adopt AT&T's and Verizon's proposed definition of "Assessable Number," modify the implementation period, and apply the new methodology to certain other fees. AT&T also explained that if the Commission decides that any special treatment is warranted with respect to how certain classes of end users (*e.g.*, public universities) are assessed USF fees, such special treatment should be implemented differently from the special treatment afforded to certain types of *services* (*e.g.*, Lifeline service). And AT&T also explained why the proposal contained in Appendices A and C to the *Further Notice* would be nearly impossible for contributors to implement and for the Commission and USAC to audit—which is why the proposal in the *Appendix B Draft Order* is preferable with respect to contribution methodology. We summarize all these points below.

First, the Commission should amend the capacity/assessment tiers in the *Appendix B Draft Order*. Although AT&T recognizes that the *Appendix B Draft Order* proposes tiers that

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71 *See AT&T Nov. 21 Ex Parte*.

were originally suggested by AT&T and Verizon,[72] the revised tiers set forth in AT&T's filing from October 28, 2008 are more appropriate.[73] The original tier proposal could cause certain customers, particularly small-business customers, to pay considerably more in USF fees than they do today. In addition, the revised tiers should minimize the possibility that the USF fee associated with a particular connection would distort the market by giving customers incentives to purchase different services simply because of the differences in regulatory fees.

Second, AT&T urges the Commission to adopt AT&T's and Verizon's proposed definition of "Assessable Number" and reject the proposed definition contained in the draft orders. AT&T and Verizon proposed a clear and simple definition of Assessable Number: "An Assessable Number is a North American Numbering Plan (NANP) telephone number that enables a Final Consumer to make or receive calls."[74] By contrast, the definition proposed in the drafts is confusing; it introduces—without explanation—new concepts and terminology not previously used by Congress or by the Commission; and it is unnecessarily overbroad. In particular, although the Commission's draft orders would treat "functional equivalent identifiers" such as IP addresses as "Assessable Numbers," they do not explain how such a proposal could

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[72] *Appendix B Draft Order* ¶ 81 (an assessable connection up to 64 kbps will be assessed $5/month; an assessable connection over 64 kbps will be assessed $35/month).

[73] *See id.* ¶ 3. The revised tiers are as follows: interstate dedicated business connections with capacity up to and including 25 mbps should be assessed $2/month; connections that are over 25 mbps and up to and including 100 mbps should be assessed $15/month; and connections over 100 mbps should be assessed $250/month.

[74] Letter from Mary L. Henze, AT&T, and Kathleen Grillo, Verizon, to Marlene Dortch, FCC, *Universal Service Contribution Methodology*, WC Docket No. 06-122; *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Attachment at 1 (filed October 20, 2008). AT&T and Verizon obviously agree that for purposes of this definition, only NANP telephone numbers used in the United States and its territories and possessions should be included. *See, e.g.*, *Appendix B Draft Order* ¶ 63 n.162.

practically be implemented.[75] Instead of creating confusion by including functionally equivalent identifiers in the definition of "Assessable Number" now, the Commission should seek further comment on whether and how to define an "identifier" that is functionally equivalent to a NANP telephone number.

Third, the Commission should give contributors one full year—not a mere six months, as the current drafts propose—in which to modify their billing systems to implement a numbers- and connections-based contribution methodology. Indeed, AT&T and Verizon have requested one year to make such changes and an additional six months *beyond* the twelve-month implementation period during which providers would report numbers while continuing to contribute based on revenues.[76] While AT&T would like to move to a numbers- and connections-based methodology as quickly as possible, it will have to make significant and complex modifications to its numerous billing systems in order to begin tracking telephone numbers and connections. Unfortunately, such fundamental changes cannot be implemented overnight and will require at least a full year to be implemented properly.

Fourth, the Commission should reconsider its proposed decision to maintain a revenues-based contribution methodology for the Telecommunications Relay Services ("TRS"), local number portability, and NANP funds. Requiring contributors to maintain dual contribution methodologies (numbers and connections for USF; revenues for the other funds) would serve no policy goal, and the Commission has identified none. Moreover, that approach would unnecessarily complicate providers' compliance efforts. Indeed, perpetuating the revenues-

[75] *See AT&T Nov. 21 Ex Parte* at 4 (explaining how broadband Internet access service providers (not application providers) typically assign consumers dynamic, not static, IP addresses for a given session and how the application provider (*e.g.*, Skype) thus has no control over the assignment of its customers' IP addresses and would seemingly have no ability to assess them).

[76] *Id.* at 6.

based assessment for these funds would contradict the Commission's previous determination that using the same funding basis and reporting worksheet for all of these funds (USF included) "would reduce confusion and minimize the amount of information we need to collect from contributors."[77]

Fifth, should the Commission determine that exceptions to its contribution methodology are warranted based on the class or identity of certain customers (versus the type of service, such as Lifeline service), it should implement such exceptions in a manner that ensures the targeted customers will actually realize the intended benefit. For example, a rule requiring carriers to distinguish a public university or a non-profit hospital from other business customers would be costly to implement and prone to error. Indeed, because carriers have no means to make that distinction today, it could add months to the amount of time required by a provider to implement the new methodology. In their October 20 *ex parte* letter, AT&T and Verizon recommended that the Commission instead adopt a Billed Entity Applicant Reimbursement (BEAR) process similar to the approach used in the E-Rate program for years. Under this proposal, end users that are entitled to discounts or special treatment because of their status (*e.g.*, public universities) are billed and pay in full but then obtain reimbursement directly from USAC for whatever discount the Commission has approved. By self-identifying, the users that the Commission designates for special treatment can ensure that they receive the discounts to which they are entitled.[78]

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[77] Report and Order, *1998 Biennial Regulatory Review—Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, FCC 99-175, 1999 WL 492955, ¶ 65 (rel. Jul. 14, 1999) ("[U]sing the same [] basis for all four funds furthers the deregulatory, burden-reducing objectives that we seek to achieve by creating a unified contributor collection worksheet").

[78] *AT&T Nov. 21 Ex Parte* at 8-9 (also suggesting that the Commission request further comment on which class(es) of end users should be granted discounts or exemptions from USF fees and how any such exception should be implemented).

Sixth, in the *AT&T Nov. 21 Ex Parte*, AT&T urged the Commission to reject the proposal—set forth in Appendices A and C to the *Further Notice*—to require contributors to distinguish residential from business telephone numbers. This arbitrary and increasingly obsolete distinction would risk creating an uneven playing field among competitors. Different providers are likely to undertake very different levels of oversight with respect to this distinction, which would create a new opportunity for unscrupulous competitors to game the system. More generally, any distinction between residential and business telephone numbers would not reflect current marketplace realities, and it would be difficult and expensive for contributors to implement and for the Commission and USAC to audit. The proposed business/residential split would thus negate one of the principal benefits of moving away from a revenues-based contribution methodology: a clear, transparent process free of difficult decisions about what should be included in the assessable base.[79]

Finally, the Commission should address one more source of regulatory uncertainty. In the Commission's discussion classifying "IP/PSTN" services as information services, the *Appendix C Draft Order* notes that while it is preempting any state efforts to impose traditional "telephone company" regulations as they relate to IP/PSTN information services, "states are free to require contributions to state universal service or telecommunications relay service funds through methodologies that are consistent with federal policy."[80] As the Commission is aware, it preempted Minnesota's state universal service statute, among other state statutes, in its *Vonage*

[79] *Id.* at 9-11.

[80] *Appendix C Draft Order* ¶ 206 & n.527 (*citing* Letter from Robert W. Quinn, Jr., AT&T, to Chairman Kevin J. Martin, FCC, *IP-Enabled Services*, WC Docket Nos. 04-36, 06-122 and CC Docket No. 96-45, at 11-16 (filed July 23, 2008)).

Order.[81] AT&T supports the limited reversal of the *Vonage Order* as it relates to universal service and TRS contributions but requests that the Commission make that reversal explicit to avoid continued confusion on the issue. Recently, for example, a federal magistrate judge rejected arguments by a state commission that the Commission's amicus briefs on this subject could supersede the broad and controlling text of the *Vonage Order* itself.[82] To remove any doubt, AT&T recommends that the Commission expressly reverse the state USF/TRS contribution portion of the *Vonage Order* in the contribution methodology section of its order in this proceeding.

C. The Commission Should Modify The *Draft Order*'s Lifeline Broadband Pilot Proposal To Increase Participation In The Pilot

In the *Draft Order*, the Commission proposes a three-year Broadband Lifeline/Link Up Pilot Program (pilot program) to examine how its low-income support mechanisms could be used to expand access to broadband Internet access services for low-income Americans.[83] Specifically, the Commission proposes to make available $300 million per year for each of the next three years to enable ETCs to provide discounted broadband Internet access services and access devices (such as a laptop or desktop computer, or a handheld device) to eligible low-income consumers.[84]

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[81] Memorandum Opinion and Order, *Vonage Holdings Corp.*, 19 FCC Rcd 22404, 22408 ¶ 10 & n.28 (2004) (identifying Minn. Stat. § 237.16, subdivision 9 of which directs the Minnesota state commission to establish and require contributions to a state universal service and TRS fund, as among the state regulations at issue).

[82] Magistrate Judge's Proposed Findings and Recommended Disposition, *New Mexico Public Reg. Comm'n v. Vonage Holdings Corp*., Civ. No. 6:08-cv-00607-WJ-WDS, at 4-5 (D.N.M Nov. 12, 2008) (noting that "the filing of a brief in a separate lawsuit does not change the legal effect of the *Vonage Preemption Order* and is not persuasive," and suggesting that "the proper approach is to have the FCC reevaluate the issue or make the FCC a party and litigate the current validity of their order").

[83] *See Appendix C Draft Order* ¶¶ 60-87; *see also Further Notice*, Appx. A, ¶¶ 64-91.

[84] *Appendix C Draft Order* ¶¶ 60-87.

AT&T agrees with the Commission that consumers with low incomes should enjoy the well-documented benefits of Internet access services to ensure that they are not left behind in today's information-based economy.[85] Supporting access to such *services* would have a ready and well-proven parallel in the legacy Lifeline and Link Up programs. Supporting Internet access *devices*, on the other hand, would raise complex administrative and other questions that are better addressed in a further notice at the completion of the pilot program. Non-CMRS broadband Internet access providers are not in the business of providing Internet access devices to their customers,[86] and thus lack the systems, procedures, and expertise to distribute, track, maintain, and—if necessary—repossess such devices. The Commission's proposal would effectively require carriers that wish to participate in the pilot program to act as computer resellers and re-possessors if their subscribers are no longer eligible. Any such requirement would raise a host of implementation concerns and would also make participation in the pilot program less likely.[87] The Commission should limit support under the pilot program so that it is

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[85] *Id.* ¶¶ 68-69; *see also* Connected Nation, Inc., *The Economic Impact of Stimulating Broadband Nationally*, at 1, 17-20 (Feb. 21, 2008), *available at* http://connectednation.com/publications/Connected%20Nation%20Broadband%20Economic%20Impact%20Full%20Report_2008%2002%2021_web%20version.pdf (finding that accelerated broadband deployment results in increased employment, saved mileage costs, lower environmental pollution, saved healthcare costs, saved time, improved education, more efficient government services, and a more technologically literate workforce).

[86] Based on the examples provided in the *Draft Order* (laptop and desktop computers, and handheld devices), AT&T does not believe the Commission intended this term to include modems and routers. *See, e.g.*, *Appendix C Draft Order* ¶ 77.

[87] Under the Commission's proposal, ETCs would have to repossess devices if the subscriber does not use the device "in compliance with the terms of this order or other applicable laws or regulations." *See, e.g.*, *id.* ¶ 86. The Commission does not explain how this would be determined or regulated. Since the proposed program would provide only up to $100 toward the purchase of a device, it is unclear what ability or right an ETC would have to repossess that device (given that the subscriber will have spent his or her own money to purchase it). And even assuming *arguendo* that the $100 dollars covered the entire cost of a device, it is not clear what an ETC is to do with a reclaimed device. Must it be re-used or recycled for the pilot program? May it be resold (in the unlikely event that the device has any value)? Does the ETC have any

available only for connection to networks offering broadband Internet access service and should defer to further proceedings any consideration of the need for and the costs of funding *devices*.

To enable broad participation in the pilot program, the Commission should also establish a Lifeline-only designation that is independent from (and not subject to all the requirements of) the traditional ETC designation established under Section 214. AT&T has previously recommended the establishment of such a Lifeline Service Provider (LSP) designation for the existing (voice) Lifeline program as well.[88] As AT&T has explained, this new LSP designation could be awarded to non-telecommunications carriers, such as interconnected VoIP providers. Such a designation would allow interconnected VoIP providers to participate in the existing Lifeline program and would also permit broadband Internet access providers that do not qualify as "telecommunications carriers" to participate in the proposed Broadband Lifeline pilot.

The Commission has ample authority to establish such a designation under Title I. Indeed, the Commission relied on its Title I authority in 1985 to establish the Lifeline program.[89] Moreover, the Commission already has approved at least one ETC application for the sole purpose of providing Lifeline service.[90] In so doing, the Commission has tacitly (if not explicitly) recognized that: (1) it may, through forbearance of certain requirements, authorize ETCs to participate in the low-income program without subjecting them to the full panoply of

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obligations with respect to the data stored on a repossessed computer (is the ETC obligated to protect such data, erase it, or store it on behalf of its former customer), and is the ETC liable for any breach of such obligations? What happens if the ETC is unable to reclaim the device? The Commission would have to address these and other details before requiring service providers to subsidize devices, so that providers may evaluate the benefits and risks of participating.

88 *AT&T USF NPRMs Comments* at 25-27.

89 *Appendix C Draft Order* ¶ 61; *AT&T USF NPRMs Comments* at 26-27.

90 *See, e.g.*, Order, *Federal-State Joint Board on Universal Service, Tracfone Wireless, Inc.*, CC Docket No. 96-45, FCC 08-100 (rel. April 11, 2008).

obligations associated with the high-cost program; and (2) there are significant consumer benefits in having additional ETCs participate in the Lifeline program.

Establishing a LSP designation pursuant to Title I rather than Title II would offer several benefits. As a preliminary matter, this approach would allow the Commission to invite information service providers to participate in the pilot program. Since these entities are not "telecommunications carriers," they cannot participate in the regular high-cost fund under Section 254. But they *should* be eligible to participate, because expanding the provider pool in this way will help achieve the pilot's goal of increased broadband Internet access penetration among eligible consumers. Relying on Title I also makes sense to the extent the LSP designation is connected to the pilot program, which is supporting a service that is not (currently) included in the universal service definition.

In addition, the current language requiring "download speeds equal to or greater than 768 kbps and upload speeds greater than 200 kbps" could imply that providers would be required to guarantee that customers would always have service at these minimum speeds. Instead, AT&T recommends that participating wireline broadband Internet access service providers offer broadband Internet access service with *advertised* download speeds equal to or greater than 768 kbps and *advertised* upload speeds greater than 200 kbps, and mobile wireless broadband Internet access service providers offer *advertised* download speeds of at least 600 kbps and *advertised* upload speeds of at least 500 kbps. Separate minimum advertised speeds for wireline and mobile wireless broadband services are appropriate for this pilot because of the differing transmission speed capabilities of the existing wireline and mobile wireless broadband technologies. AT&T also believes that it is appropriate to incorporate "advertised," and not "guaranteed," minimum speeds into the pilot program. As the California Public Utilities Commission found in specifying that advertised speeds should be used for the California

Advanced Services Fund (a fund designed to encourage broadband deployment in unserved and underserved areas):

> [T]he Commission believes that the advertised speed is a reasonable indicator of the actual speed. While not exactly the same definition used by the FCC in Form 477, it is consistent with how broadband services are purchased and understood by consumers. In advertising for broadband service, broadband providers regularly include legal caveats related to speed and the Commission fully expects that those same caveats would be included in CASF applications. A number of state and federal statutes and regulations of general applicability relate to ensuring commercial advertisements contain accurate information. It is reasonable for the Commission to rely on those rules and their enforcement by appropriate state and federal enforcement entities. This Commission does not need to use its scarce resources to engage in speed monitoring exercises absent evidence of actual instances of alleged fraud relating to broadband service funded under this program. Thus reliance on advertised speeds provides the best measure of reporting and comparing applications.[91]

Finally, AT&T recommends that the Commission consider the following tweaks to its proposal. As drafted, the Commission would exclude from the pilot consumers who already have broadband Internet access service. But if a consumer meets the Lifeline eligibility requirements, there is no policy justification for penalizing him or her for already having made the difficult decision to invest in broadband Internet access services; the expenditure may still pose a significant hardship for that household. Moreover, as a practical matter, AT&T does not know how a potential pilot participant would "demonstrate" to the provider that he or she does not currently have a computer or obtain broadband Internet access service from another service

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[91] *See* Resolution T-17143, *Approval of CA Advanced Services Fund (CASF) Application Requirements and Scoring Criteria for Awarding CASF Funds*, Docket R-06-06-028, 4-5 (Cal. PUC filed June 12, 2008). In determining that *advertised* speeds should be used, the California Commission acknowledged comments by parties observing that many factors may cause variances to occur, such as the time of day, distance from the central office or remote terminal, number of customers using the network at the same time, etc. AT&T also noted that with Digital Subscriber Line (DSL) service, speeds are faster nearer the central office and slower farther from the central office. *See id.* at 3-4.

provider.[92] The Commission also should clarify that a participating LSP can designate an area that is smaller than its entire ETC service area/study area for the pilot. AT&T believes that this was the Commission's intent, but there are several inconsistent statements in the *Draft Order* on this point.[93]

[92] *Appendix C Draft Order* ¶ 82. Even if the provider required a self-certification from the potential participant, AT&T does not know how the provider or a USAC/Commission auditor could ever verify that participant's assertions.

[93] *Compare id.* ¶ 79 ("Such certification must identify the service area in which the ETC plans to offer such Lifeline/Link Up broadband services. . . .") *with id.* ¶ 83 ("A participating ETC must offer the services and supported devices to all qualifying low-income consumers throughout its service areas.").

CONCLUSION

With the modifications discussed above, the Commission should adopt the reform plan for intercarrier compensation and universal service distribution outlined in the *Appendix C Draft Order* and the contribution methodology reforms outlined in the *Appendix B Draft Order*.

Respectfully submitted,

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